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For The Northern Mariana Islands
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BRIEN SERS NICHOLAS
Attorney at Law
UIU Bldg., 1st Floor
P.O. Box 502876
Saipan, MP 96950

Telephone Nos.: (670) 235-7190/91
Facsimile No.: (670) 235-7192

Attorney for Plaintiff
Rosario DLG Kumagai

IN THE UNITED STATES DISTRICT COURT
FOR
THE NORTHERN MARIANA ISLANDS

ROSARIO DLG KUMAGAI,

CIVIL ACTION NO. 05-0037

Plaintiff,

vs.

PAMELA BROWN, a.k.a. PAMELA
BROWN BLACKBURN, personally
and in her official capacity as the
Attorney General for the
Commonwealth of the Northern
Mariana Islands;
FERMIN M. ATALIG, personally
and in his official capacity as the
Secretary of Finance,
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS;
MARIA LOURDES SEMAN ADA,
personally and in her official capacity
as the Executive Director for the
Commonwealth
Development Authority;
COMMONWEALTH DEVELOPMENT
AUTHORITY;
BANK OF GUAM;
and JOHN DOES ONE thru TEN,

PLAINTIFF'S OPPOSITION BRIEF RE:
DEFENDANT CDA AS ARM OF THE
STATE (CNMI)

Dated: May 18th, 2006
Time: 9:00 a.m.
Judge: Hon. Alex R. Munson
Chief Judge

Defendants.

COMES NOW ROSARIO DLG KUMAGAI, as Plaintiff herein, by and through her
Counsel, Brien Sers Nicholas, Attorney at Law, and file her opposition in this matter
in response to this Honorable Court's Order requiring additional briefing on the status
of Defendant Commonwealth Development Authority ["Defendant CDA"] as an arm

1 of the Commonwealth of the Northern Mariana Islands ["CNMI"].

3 **Introduction:**

4 Defendant CDA and the Office of the Attorney General ["AG"], relying
5 particularly on the first two (2) of the five (5) factor test guides laid out in Mitchell v.
6 Los Angeles Community College Dist., 861 F.2d 198 and as applied in Aguon v.
7 Commonwealth Ports Authority, 316 F.3d 899 (9th Cir. 2003), argue that said
8 Defendant CDA is an "arm of the CNMI" and therefore it cannot be held liable under
9 42 U.S.C. § 1983.¹

10 The *Mitchell* five-factor test guides are as follows: (1) "whether a money
11 judgment would be satisfied out of state funds," (2) "whether the entity performs
12 central governmental functions," (3) "whether the entity may sue or be sued," (4)
13 "whether the entity has the power to take property in its own name or only in the
14 name of the state" and (5) "the corporate status of the entity." See Mitchell, 861
15 F.2d at 201.

16 As would be seen below, contrary to the arguments presented by Defendant
17 CDA and the AG, applying the above-enumerated factors to the facts of this case and
18 in light of Defendant CDA's enabling statute clearly shows that Defendant CDA could
19 not and can not be deemed to be an arm of the CNMI for purposes of § 1983
20 liabilities.

22 **(1) Defendant CDA Can Satisfy Any Monetary Judgment On Its Own:**

23 There is no question whatsoever that Defendant CDA is legally an "autonomous
24 public agency" with all "the rights and privileges of a corporation." See 4 CMC §

26 ¹ The AG is quite wrong in its assumption that this Honorable Court's question
27 is "whether CDA is entitled to sovereign immunity against the § 1983[.]" See AG's Brief, pg.
28 2, lines 1 thru 3. As a matter of law, the CNMI does not have sovereign immunity against
a claim based on federal laws. See Fleming v. Dep't of Public Safety, 837 F.2d 401 (9th Cir.
1988); see also Norita v. CNMI, 331 F.3d 690 (9th Cir. 2003).

1 10201(a) and (d). It has its own assets and its own funds. For budgetary purposes,
2 Defendant CNMI does not derived any of its fundings from the CNMI government
3 treasury per se. See 4 CMC § 10401 et seq. From all of these funds and assets,
4 Defendant CDA is only permitted to use no more then two percent (2%) for its
5 administrative expenses. See 4 CMC § 10402(f). As such, Defendant CDA has for
6 purposes of paying on any judgment rendered against it in this case some ninety-eight
7 percent (98%) of its funds and assets available for such purposes. Based on the
8 affidavit of Mr. Oscar Camacho, it is quite evident that Defendant CDA does have the
9 means and the ability to pay whatever judgment that may be entered against it in this
10 case. Therefore, it does not need any financial assistance from the CNMI government
11 to do so. Similarly, any such judgment so entered can not and could not be deemed
12 to warrant Defendant CDA filing for bankruptcy. As a side issue, Defendant CDA does
13 and will have more than sufficient time, i.e., 20 years, to make good on such a
14 judgment. See 7 CMC § 2501.

15 Equally supportive of the fact that Defendant CDA does have the financial
16 means to pay a judgment on its own is the fact that, by law, it is authorized to not
17 only give out loans but also guarantee legal obligations of the CNMI and its entities as
18 well as private individuals and businesses. See 4 CMC § 10203(a) et seq. In fact, it
19 can also make loans for its own benefits as well. Id. In all, Defendant CDA does have
20 the resources and the means to pay any judgment against it in this case without the
21 need for the CNMI treasury to be affected.

22
23 **(2) Defendant CDA Does Not Perform Any Central Government Functions:**

24 This is where Defendant CDA and the AG base their principal argument that said
25 Defendant CDA is an arm of the CNMI government. That is, relying on Augon v. CPA,
26 316 F.3d 899 (9th Cir. 2003), both Defendant CDA and the AG argue generally that
27 said Defendant CDA performs "essential government functions relating to the
28 economic development of the Commonwealth." See AG's Brief, pg. 3; see also

1 Defendant CDA's Brief, pg. 3. To the contrary, in light of the Aguon case, the role of
2 Defendant CDA in the economic well-being of the CNMI could not be deemed to be
3 affecting the functions of the CNMI to its people, economically speaking. In other
4 words, the role of Defendant CDA is no different then the roles being played by some
5 of the banking entities now in operation in the CNMI, i.e., Bank of Hawaii, Bank of
6 Guam, etc., as far as the economy of the CNMI is concerned.

7 In Aguon, the Ninth Circuit found that CPA (by statue) was established to act
8 on behalf of the CNMI in its dealings with the Untied States vis a vis all rights,
9 obligations and duties of the CNMI under any agreements CNMI may have with any
10 department or agency of the Untied States in connection with the operation of any
11 ports in the Commonwealth. The Ninth Circuit further found that CPA was eligible
12 to act for the CNMI and to do anything necessary to establish eligibility for federal
13 funding. Id. at 902. From the foregoing, the appellate court then concluded that if
14 CPA were to be faced with a large money judgment which it could not pay, the CNMI
15 would be compelled to protect its island economy by responding with an appropriation
16 to provide the citizens of the CNMI with essential seaport and airport services. Id. at
17 903. Contrast the foregoing with Defendant CDA's statutory roles in the CNMI's
18 economy, it becomes quite clear that Defendant CDA cannot be place in the same
19 status as that of CPA. Aside from seeking investments, Defendant CDA is also
20 charged with guarantying the obligations of and providing loans to private loans to
21 private individuals and businesses. See 4 CMC §§ 10203 (13), (14) & (15). From
22 time to time, Defendant CDA has imposed moratoriums on its loan programs without
23 any disruption being made to the CNMI economy. Again, comparing the foregoing to
24 CPA's inability to operate the CNMI's seaport and airport, one can see that Defendant
25 CDA's role cannot be deemed to be of any real threat to the whole economy of the
26 CNMI if a huge judgment is entered against it in this case.

27 Furthermore, the mere fact that Defendant CDA is a "depository" of federal
28 funds thus not render it as performing functions central to the CNMI government. See

1 4 CMC § 10203(3). The CNMI government does have its own Department of Finance
2 capable of performing the foregoing function. Similarly, the mere fact that Defendant
3 CDA is thinly associate with the financing of capital improvement projects in the CNMI
4 is again of no consequence with respect to the analysis in this case. That is,
5 Defendant CDA does not make any decision as to how the capital improvement
6 projects are to be financed. All Defendant CDA does is to act as a "depository" of any
7 such funds earmarked for capital improvement projects. Again, Defendant CDA's role
8 as to any "federal funds" is no where near the role played by CPA as set forth in the
9 Aguon case.

10 In all, unlike the need for the CNMI to enter into the picture to protect its people
11 if a large monetary judgment were to have been entered against CPA in the Aguon
12 case, no such need exist in this case with respect to Defendant CDA. Defendant
13 CDA's role in the CNMI economy will not be affected to such a degree if a large
14 judgment is entered against it to warrant the CNMI government to enter into the
15 picture. After all, Defendant CDA is but an "economic advisor." Its failure to give
16 advise, similarly to its decision from time to time to put a moratorium on all of its
17 loans, proves that with or without Defendant CDA, the CNMI's economy is still very
18 much alive.

19 Accordingly, based on the rational of the Aguon case, the opposite is true with
20 respect to Defendant CNMI.

21
22 **(3) Defendant CDA May Sue And Be Sued:**

23 Defendant CDA, like any corporate entity, can sue or be sued in its own
24 corporate name. See 4 CMC § 10203(4). In fact, Defendant CDA is legally authorized
25 to employ foreclosure proceedings to protect its outstanding loans and investments.
26 See 4 CMC § 10203(16).

27 Interestingly enough, in this case, when it was faced with a threat from
28 Defendants CNMI and Brown of being sued if it were to allow the processing of

1 Plaintiff's land compensation claim, Defendant CDA opted to go along with the illegal
2 demand from Defendants CNMI and Brown and agreed not to process Plaintiff's claim.
3 The reason for Defendant CDA to have done what it did to Plaintiff was that it did not
4 want to be part of the lawsuit filed against Plaintiff in the CNMI Superior Court. See
5 Plaintiff's Complaint, Exhibit "S."

6
7 **(4) Defendant CDA Has The Power To Take Property In Its Own Name:**

8 Defendant CDA, by law, has the power to acquire and hold interest in any real
9 or personal property of whatever form and is further authorized to sell, mortgage, or
10 otherwise dispose of the same. See 4 CMC § 10203(5). And, as alluded to above,
11 it also has the power to foreclose on the same. See 4 CMC § 10203(16).

12
13 **(5) Corporate Status Of Defendant CDA:**

14 Defendant CDA, as a corporate entity, has its own Board of Directors legally
15 charged with duties and responsibilities not subject to any constraint from the central
16 government except by law. See 4 CMC § 10301 et seq.; see also 4 CMC 10305 et
17 seq. And, as already mentioned above, Defendant CDA also enjoys very much all the
18 rights and privileges of a corporation. See 4 CMC § 10201(d).

19
20 **Conclusion:**

21 For all the foregoing reasons herein stated, Plaintiff respectfully ask that this
22 Honorable Court denies the motion to dismiss in this case by Defendants CDA and Ada
23 by finding that Defendant CDA is not an arm of the CNMI government.

24 Dated this the 13th day of April, 2006.

25 Respectfully Submitted:

26
27 
28 Brien Sers Nicholas, Esq.

CERTIFICATE OF SERVICE

I, BRIEN SERS NICHOLAS, hereby certify that on April 13, 2006, I have caused to be served a true and correct copies of the foregoing **PLAINTIFF'S OPPOSITION BRIEF** **RE: DEFENDANT CDA AS ARM OF THE STATE (CNMI)**, upon the following counsel via personal delivery:

1. VICENTE T. SALAS, ESQ.
2nd Floor UIU Building
San Jose, Saipan
Counsel for CDA & Ma. Lourdes S. Ada
2. VICTORINO DLG TORRES, ESQ.
3rd Floor, Bank of Guam Bldg.,
Garapan, Saipan
Counsel for Bank of Guam
3. G. PATRICK CIVILLE, ESQ.
Civille and Tang
2nd Floor, Cabrera Center
Chalan Laulau, Saipan
Counsel for CNMI & Pamela Brown
4. BENJAMINE L. DEMOUX, AAG
CNMI Attorney General's Office - Civil Div.
2nd Floor, Juan A. Sablan Memorial Bldg.
Capitol Hill, Saipan
*Counsel for the Office of the Attorney General
as Amicus Curiae*

DATED: 13th day of April, 2006.


BRIEN SERS NICHOLAS (Bar # F0163)